Supreme Court, U.S.
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No. 92-872

In the Supreme Court of the United States

OCTOBER TERM, 1992

IBRAHIM FEZ GHASSAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an individual who has been found deportable by a final order of the Board of Immigration Appeals (BIA) remains eligible to file a motion to reopen his deportation proceedings to seek relief from deportation under 8 U.S.C. 1182(c), even though that relief is only available to permanent resident aliens and an individual found deportable is no longer a permanent resident alien.

2. Whether the BIA abused its discretion in discounting petitioner's reliance on his marriage as an equitable factor supporting relief from deportation based on the fact that petitioner became married after the deportation proceedings were instituted.

3. Whether the BIA properly rejected the finding of the immigration judge that petitioner had rehabilitated himself.

4. Whether the court of appeals properly reviewed the decision of the BIA for abuse of discretion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Cerna, In re, Interim Dec. No. 3161 (BIA Oct. 7, 1991)	4, 7, 8
Cerna v. *INS*, 979 F.2d 212 and 979 F.2d 213 (11th Cir. 1992)	7
Diaz-Resendez v. *INS*, 960 F.2d 493 (5th Cir. 1992)	5, 10
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	2-3
Gonzales v. *INS*, 921 F.2d 236 (9th Cir. 1990)	7
INS v. *Abudu*, 485 U.S. 94 (1988)	6
Silva, In re, 16 I. & N. Dec. 26 (BIA 1976)	3
Tapia-Acuna v. *INS*, 640 F.2d 223 (9th Cir. 1981)	2
Vargas v. *INS*, 938 F.2d 358 (1991)	7, 8
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10

Statutes and regulation:

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:	
§ 545(d), 104 Stat. 5066	8
§ 602, 104 Stat. 5077-5082	2
§ 602(a), 104 Stat. 5077-5081	2
§ 602(d), 104 Stat. 5082	2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
8 U.S.C. 1101(a)(20)	6, 7
8 U.S.C. 1105a(a)	10
8 U.S.C. 1182(c)	2, 3, 4, 5, 6, 7
8 U.S.C. 1251(a)(2)(B)(i) (Supp. II 1990)	2
8 U.S.C. 1251(a)(11) (1988)	2
8 U.S.C. 1252(b)	7

Statute and regulation—Continued: Page

21 U.S.C. 841(a) 2
8 C.F.R. 243.1 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-49) is reported at 972 F.2d 631. The decisions of the Board of Immigration Appeals (Pet. App. 5-22, 23-33) and the immigration judge (Pet. App. 1-4) are unreported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 50-51, 52-53) were entered on September 8, 1992. A petition for rehearing was denied on October 8, 1992. Pet. App. 54-55. The petition for a writ of certiorari was filed on November 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Lebanese national who came to the United States in 1978 to attend college. In 1981 he became a permanent resident alien. In 1984 he pleaded guilty to charges of conspiracy to import and distribute heroin, in violation of 21 U.S.C. 841(a), arising out of a heroin conspiracy organized by his brother. He was sentenced to eight years in prison and a $25,000 fine. Petitioner was released from prison to the custody of the Immigration and Naturalization Service (INS) in 1989. In March 1989, INS instituted deportation proceedings under 8 U.S.C. 1251(a)(11) (1988).[1] Subsequently, in September 1989, petitioner married Donna Owings, a United States citizen. Pet. App. 6, 9-10, 35.

2. The immigration judge held petitioner deportable. Pet. App. 1-4. Before the immigration judge, petitioner admitted his deportability, *id.* at 1, but sought discretionary relief under 8 U.S.C. 1182(c), which authorizes the Attorney General to grant certain discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a lawful unrelinquished domicile [in the United States] of seven consecutive years."[2] The

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[1] The grounds of deportation were reorganized by Section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077-5081, and that provision now appears as 8 U.S.C. 1251(a)(2)(B)(i) (Supp. II 1990). The amendment does not apply to petitioner because the Act states that the amendments set forth in Section 602 "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." Section 602(d), 104 Stat. 5082.

[2] Although the statute on its face authorizes the Attorney General only to admit aliens returning to such a domicile, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir.

immigration judge denied the application for relief from deportation, explaining that although petitioner had "show[n] genuine rehabilitation, * * * the nature and seriousness of his offense outweighs these equities," emphasizing the fact that petitioner "was well-educated and employed during his criminal involvement." Pet. App. 3.

3. The BIA affirmed. Pet. App. 5-22. The BIA noted its settled rule "that an alien who has engaged in serious criminal misconduct must show unusual or outstanding equities before discretion may be exercised in the alien's favor." *Id.* at 16-17 (internal quotation marks omitted). Because the BIA agreed with the immigration judge that petitioner's conduct was serious, petitioner's case was covered by that rule. *Id.* at 20-21. In response to petitioner's claim that the immigration judge erred in not granting him relief even though the judge believed petitioner had rehabilitated himself, the BIA concluded that it was "unconvinced as to [petitioner's] rehabilitation." *Id.* at 21. It explained that petitioner

> took part in an elaborate criminal conspiracy despite the obvious consequences if he should be discovered and despite the pernicious nature of the activity in which he was engaged. We are not persuaded by [petitioner's] good behavior since his conviction that he will not succumb again to his family's pressure and the temptation of the large profits to be had in such activities.

Ibid. Turning to the factors in petitioner's favor, the BIA noted that petitioner's marriage, coupled with the inability of his family to travel to Lebanon, raised some

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1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also *id.* at 32 (Appleman, concurring) (noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

equities in his favor, but found that the weight of that factor was "diminished because [petitioner] and his wife married after deportation proceedings were instituted, and with full knowledge that he might be deported." *Id.* at 22. Accordingly, the court concluded that "the equities presented" did not justify the relief sought by petitioner. *Ibid.*

4. Petitioner then filed a motion to reopen the proceedings to introduce new evidence to support his request for relief under Section 1182(c), as well as a motion to reconsider. The BIA denied both motions. Pet. App. 23-33. The BIA first addressed the motion to reopen and explained that its earlier order had finally determined petitioner's deportability, thus depriving him of lawful permanent resident status. Because he no longer was a lawful permanent resident, he no longer was eligible for relief under Section 1182(c), and thus could not reopen the proceedings to obtain that relief; the BIA relied heavily on its recent decision in *In re Cerna*, Interim Dec. No. 3161 (Oct. 7, 1991). Pet. App. 24-27.

The BIA then addressed petitioner's motion to reconsider. Pet. App. 27-33. First, the BIA rejected petitioner's claim that it had erred in engaging in de novo review of the immigration judge's evaluation of petitioner's claim of rehabilitation, and reiterated its finding that petitioner had failed to demonstrate rehabilitation. *Id.* at 27. In any event, the BIA concluded, the serious nature of petitioner's crime would have made it inappropriate to grant relief "even if we were persuaded of [petitioner's] rehabilitation." *Id.* at 29. The BIA also rejected petitioner contentions that it should reconsider its evaluation of the equities, *id.* at 30, that it should consider whether the equities had changed during the course of the administrative proceedings, *id.* at 30-31, and that it should consider new evidence, *id.* at 31-32. As for the new evidence, the BIA noted that its review "is a

review of the record before the immigration judge," and thus that it does not consider new evidence except to the extent necessary to determine whether the matter should be remanded to the immigration judge. The BIA explained that the new evidence—which related to petitioner's alleged rehabilitation and to a miscarriage petitioner's wife had suffered—would not have been sufficient to justify remanding the matter to the immigration judge. *Id.* at 32.

5. Petitioner filed petitions for review of the underlying decision and the denial of the motion to reconsider. The court of appeals consolidated the two matters and denied the petitions. Pet. App. 34-49. First, the court reiterated its view that it reviews BIA decisions on applications for relief from deportation under Section 1182(c) only for abuse of discretion. Pet. App. 39 (quoting *Diaz-Resendez* v. *INS*, 960 F.2d 493, 495 (5th Cir. 1992)). Applying that rule, it affirmed the BIA's denial of petitioner's application for relief from deportation. The court rejected petitioner's contention that it was irrelevant that his wife's hardship was diminished by her knowledge of his possible deportation, explaining that "[c]onsidering his wife's previous knowledge seems eminently equitable." Pet. App. 40. The court also rejected petitioner's contention that the BIA failed to consider all of the relevant evidence, stating that "the BIA did consider all of [petitioner's] evidence—it just did not find it compelling." *Ibid.* It then rejected petitioner's contention that the BIA erred in finding that he was not rehabilitated. The court noted that the BIA, unlike the courts of appeals, is not a court of error and thus is free to review the record de novo. *Id.* at 40-41. The court also concluded that the BIA's opinion reflected an adequate basis for its view that petitioner was not rehabilitated, principally because petitioner "has not established that his brother will be unable to entice him into another

criminal scheme" and had failed to present evidence that petitioner "has become immune to his brother's blandishments or has broken off contact with him." *Id.* at 42.[3]

The court also affirmed the BIA's denial of petitioner's motion to reopen. Pet. App. 44-47. The court agreed with the BIA that petitioner was not eligible for reopening to seek relief from deportation under Section 1182(c), because petitioner was not eligible for that relief at the time he filed the motion to reopen. Pet. App. 46-47. Finally, the court affirmed the BIA's denial of petitioner's motion to reconsider, concluding that it did "not believe that the BIA abused its discretion in rejecting the motion." *Id.* at 49.

ARGUMENT

1. Petitioner first argues (Pet. 14-15, 17-20) that the BIA erred in denying his motion to reopen the deportation proceedings on the ground that he was ineligible for the relief he sought at the time he filed the motion to reopen. As this Court has explained, an alien seeking to reopen deportation proceedings must make a prima facie showing that he is eligible for the relief he seeks. *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). To be eligible for relief under 8 U.S.C. 1182(c), an alien must, among other things, be a lawful permanent resident alien. Under 8 U.S.C. 1101(a)(20), an alien is "lawfully admitted for permanent residence" if he has "the status of having been lawfully accorded the privilege of residing permanently in the United States * * *, such status not having changed."

Hence, the question in this case is whether petitioner's status as a lawful permanent resident alien

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[3] Petitioner testified before the immigration judge that "he unwittingly became involved in [the criminal conspiracy]" and "did not know the nature of his brother's activities until [he was arrested]." Pet. App. 10.

"changed," for purposes of 8 U.S.C. 1101(a)(20), at the time the BIA issued a final order of deportation. In light of the statutory mandate that such decisions "shall be final" upon completion of administrative proceedings, see 8 U.S.C. 1252(b); 8 C.F.R. 243.1 ("an order of deportation * * * shall become final upon dismissal of an appeal by the [BIA]"), the BIA consistently has held that an individual's status changes at that time and that he thus is not thereafter eligible to seek relief dependent on that status. See *In re Cerna*, Interim Dec. No. 3161 (BIA Oct. 7, 1991), aff'd, *Cerna* v. *INS*, 979 F.2d 212 and 979 F.2d 213 (11th Cir. 1992) (Table) (per curiam); see also *Gonzales* v. *INS*, 921 F.2d 236, 238-239 (9th Cir. 1990) (similar analysis). Because a motion to reopen is, in the BIA's view, a request for a new decision based on arguments not before the original tribunal, the BIA has concluded that individuals for whom it has issued a final order of deportation should not be able to reopen their deportation proceedings to secure relief from deportation based on Section 1182(c). *Cerna*, Interim Dec. No. 3161, slip op. 6.[4]

Petitioner correctly notes (Pet. 14) that the Second Circuit in *Vargas* v. *INS*, 938 F.2d 358 (1991), overturned a BIA decision denying a motion to reopen in similar circumstances. *Id.* at 360-364. The court in that case, however, relied on the absence from the BIA opinion of any "mention of statutory or regulatory provisions," *id.* at 360. Because the opinion had no analytical basis, the court concluded that it "effectively amend[ed] an existing regulation without notice or opportunity for com-

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[4] As the BIA concluded in *Cerna*, this rule does permit aliens to file motions to reconsider, because such a motion does not seek a new decision based on new arguments, but instead seeks to convince the tribunal that it erred in resolving the matters placed before it originally. See *Cerna*, Interim Dec. No. 3161, slip. op. 5-6.

ment." *Id.* at 361. The court declined to consider INS's attempt to justify the decision under the governing statutes and regulations, characterizing those matters as "[p]ost hoc explanations * * * offered by appellate counsel [which] are * * * an inadequate basis for the exercise of substantive review of an administrative decision." *Id.* at 363.[5] Those criticisms do not apply to the decision under review, because, in response to the decision in *Vargas*, the BIA gave the matter plenary consideration in *Cerna* and issued a lengthy opinion explaining the basis for its decision. The Second Circuit has not had an opportunity to consider its position in light of *Cerna*. Accordingly, the matter is not ripe for consideration by the Court at this time.[6] Futhermore, because the seriousness of petitioner's drug trafficking offenses makes it most unlikely that the result in this case would change even if the matter were reopened, this case would

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[5] The only substantive comment made by the *Vargas* panel was its suggestion that the BIA's decision was "deeply puzzling" because "[a] motion to reopen or to reconsider is not a request for a *new* decision." 938 F.2d at 362. As noted above, the BIA's decision in *Cerna* rests on the view that a motion to reopen *is* a request for a new decision. See *Cerna*, Interim Dec. No. 3161, slip. op. 6 (motion to reopen "seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered").

[6] Moreover, pursuant to Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5066, the Attorney General is in the process of promulgating regulations that would delineate more precisely the circumstances under which motions to reopen would be permissible. In connection with that process, the Attorney General is considering whether to adopt a regulation addressing the question presented here. Because such a regulation would alter the legal issues presented by the petition—whatever view the regulation adopts—that is a further consideration counseling against review by the Court at this time.

not be a suitable vehicle even if the Court were inclined to consider the question at this time.

2. Petitioner next contends (Pet. 15-16, 20-21) that the court of appeals erred in allowing the BIA to take account of the fact that petitioner's wife married him after deportation proceedings had been instituted against petitioner. As the court of appeals recognized, there is nothing unusual or untoward about considering that fact. Petitioner is subject to deportation because he committed serious drug offenses while here as a resident alien. In substance, petitioner contends that he should be immune from deportation because of the hardship the deportation will cause his wife. The fact that his wife married him years after his conviction made him deportable—indeed after the deportation proceedings already had been instituted—certainly justifies a treatment of his case different from the treatment that might be accorded a case where an innocent spouse had been married to the individual during an extended period of lawful permanent residence. Petitioner cites no decision of any court or administrative body supporting his criticism of the BIA's approach. Accordingly, in light of the deference due the BIA's evaluation of the relevant factors, the petition offers nothing to suggest that the claim merits review in this Court.

3. Petitioner also argues (Pet. 16, 21-22) that the BIA erred in determining that he had not established rehabilitation. He acknowledges that the BIA "regularly proclaims its 'de novo' review power over IJ findings," Pet. 16, and does not argue that a more deferential standard is generally appropriate, but simply that this case presented an issue of credibility as to which more deference was appropriate. Pet. 16, 21-22. He does not address the court of appeals' conclusion (Pet. App. 41 n.6) that findings of rehabilitation "require consideration of evidence extrinsic to that presented by the subject witness" and

thus do not turn solely upon the credibility of witnesses. Again, petitioner cites no authority in support of his claim of error. Moreover, as both the BIA and the court of appeals noted (*id.* at 29, 43), petitioner would not have been entitled to relief even if he had rehabilitated himself. In those circumstances, the BIA's evaluation of the evidence of petitioner's rehabilitation presents no occasion for review by this Court.

4. Finally, petitioner argues (Pet. 16-17, 22-27) that the court of appeals applied the abuse of discretion standard in an unduly deferential manner, and that various panels of the Fifth Circuit have applied that standard in different ways in reviewing BIA decisions denying suspension of deportation. Petitioner acknowledges that application of the abuse of discretion standard is appropriate and that this Court has "held that judicial review is particularly limited" in various immigration contexts. Pet. 23. Petitioner's argument is simply that the standard should have been applied with less deference in this case, because it involves relief sought by a permanent resident alien. Pet. 23-24. Again, petitioner cites no authority for that argument. In any event, the argument has no basis in 8 U.S.C. 1105a(a), which establishes a single framework for review of all challenges to "final orders of deportation."[7] Moreover, the seriousness of petitioner's drug trafficking offenses makes it most unlikely that the court of appeals would have overturned

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[7] Petitioner supports his argument by selected quotations from other decisions of the Fifth Circuit applying the abuse-of-discretion standard, primarily *Diaz-Resendez* v. *INS*, 960 F.2d 493 (1992), the decision the court of appeals stated it was following in this case, Pet. App. 39. Any tension between other decisions of the Fifth Circuit and the panel decision in this case can be resolved by the court of appeals. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

the BIA's decision under any standard. Accordingly, there is no need for further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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